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In the
Supreme Court of the United States

No. 71-1082

REUBIN O'D. ASKEW, ET AL.,
APPELLANTS,

v.

THE AMERICAN WATERWAYS OPERATORS, INC., ET AL.,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, AMICUS CURIAE

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Interest of the Amicus

The Commonwealth of Massachusetts has enacted statutory provisions (M.G.L. c. 21, §§ 27(10), 50-52) for oil pollution control and liability which are similar to Florida's challenged statute in a number of significant respects. These include the authorization for a state agency to remove oil spilled on the Commonwealth's waters, liability

without fault to the Comomnwealth for its costs incurred in removing oil, and liability without fault to the Commonwealth and to property owners for damages to public and private property resulting from oil spills. Massachusetts, like Florida, believes that federal law and federal programs do not constitute a comprehensive approach to the goal of protecting the coastal environment from oil spills. The gaps in federal law can be met by state action, and will be met by any coastal state which values its marine resources. If the decision of the district court is to stand, the constitutionality of Massachusetts' oil spill statute is in doubt. The Commonwealth is thus vitally interested in this case and urges, for the reasons hereinafter stated, that the judgment of the district court should be reversed.

Argument

I. Congress May Allow the States to Enact Laws Affecting Maritime Commerce If Such Laws Do Not Conflict with General Admiralty Law.

Congress provided in the 1970 Water Quality Improvement Act (the Act) that nothing in that act was to be construed as preempting the states from setting their own liability rules for oil spills within their territorial waters. The court below held, however, that Florida's right to enact oil spill liability rules had been preempted by both the Constitution and Congressional action. Relying on *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149, the court stated that Congress is powerless to delegate to the states any legislative authority within the admiralty jurisdiction. In *Knickerbocker,* this Court invalidated an act of Congress which would have allowed the application of state workmen's compensation laws to longshoremen injured in the course of maritime employment. The Court said then that

the Constitution took from the states all power to legislate individually in the maritime area and that Congress could not disrupt the Constitution's mandate for uniformity of maritime law by delegating its power to the states.

However, the requirement of uniformity was itself limited in *Standard Dredging Co.* v. *Murphy,* 319 U.S. 306 where the Court passed on the validity of collecting a state unemployment tax from employers of persons engaged in maritime work. The Court declined to apply the Jensen-Knickerbocker doctrine, reasoning as follows:

> "'Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved.' Just v. Chambers, 312 U.S. 383, 292. When state compensation laws began to provide a remedy for maritime torts, it was at least arguable that the state remedy interfered with the existing admiralty system of relief through actions such as maintenance and cure . . . . No principle of admiralty requires uniform state taxation." 319 U.S. at 309.

Thus, the district court erred in concluding that any state action affecting maritime matters is barred by the admiralty clause of the Constitution. To claim, as the court below seemed to do, "that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive over-simplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce." *Romero* v. *International Terminal Co.,* 358 U.S. 354, 373.

We think that the proper analytical approach for examining state laws with a maritime impact was set out in *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.,* 348 U.S. 310, 314. There, where Congress had not fashioned rules governing marine insurance contracts, and the states, by Con-

gress' consent or acquiescence, had created varying rules, the Court posed two questions: Is there a judicially-established Federal admiralty rule governing warranties in such contracts, and, if not, should the Court establish such a rule? The Court found no rule in existence and declined to fashion one, deeming the task an appropriate one for Congress if uniformity were desired. The Court observed that "[u]nder our present system of diverse state regulations, which is old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted." 348 U.S. at 320-21.

It is obvious from *Standard Dredging* and *Wilburn Boat*, both *supra*, that this Court has retreated from its holding in *Knickerbocker Ice, supra*. There are areas of the law which affect maritime commerce but nevertheless are still subject to the legislative requirements of individual states, and we submit that the instant case involves one such area.

II. Congress Has Left Many Aspects of Oil Pollution Control Unaffected by Federal Law and, in Fact, Has Anticipated that State Action Would Supplement Federal Action.

Section 1161(c)(2) of the Act requires a National Contingency Plan including an "assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities." The National Plan states that the specific commitments of state agencies and other non-Federal interests are to be set forth in regional contingency plans, National Oil and Hazardous Substances Pollution Contin-

gency Plan §203. A typical regional plan, the Region I Multi-Agency Oil & Hazardous Materials Pollution Contingency Plan (Coastal), prepared by the First Coast Guard District in Boston, provides in §203.1:

> "The general policy to be followed is that the state and local governments will be expected to respond to spills considered by the RRT [Regional Response Team] to be within the capability of such groups. The Federal Government will respond in those situations considered by the RRT to be beyond the capability of such groups."

The "exclusive federal system" test of *Standard Dredging* is not met by the basic oil spill removal program. The district court's ruling has meaning only if the Act can be read as establishing uniform principles for the recovery of cleanup expenditures made by Federal, state or local authorities. However, the plain language of the statute does not sustain such a reading. 33 U.S.C. §1161 (f)(2), for example, establishes a terminal operator's liability "to the United States Government" and provides that the "United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs." Section 1161(n) invests the district courts of the United States with jurisdiction over such actions. No provision of the Act gives state agencies access to the Federal courts to collect their cleanup expenses. Thus, the declaration of non-preemption in §1161(o)(2) must mean that state courts are to impose appropriate liabilities when state agencies remove spilled oil.

The International Convention on Civil Liability for Oil Pollution Damage, signed in Brussels in 1969 and await-

ing ratification by the United States Senate, would fill some, but not all, of the gaps in the Act.

> "The most fundamental difference between the Convention and Section 11 [the section covering oil spills] is that the Convention relates not only to government claims for 'clean-up', but also to claims for other damages sustained by public and private interests as a result of oil pollution. . . . Only seagoing vessels and other seaborne craft (other than public vessels) actually carrying 'persistent' oil in bulk as cargo fall under the coverage of the Convention, whereas Section 11 applies to *all* vessels (with the exception of public vessels) using United States waters or waters of the contiguous zone, and to onshore and offshore facilities as well."

Healy and Paulsen, *Marine Oil Pollution and the Water Quality Improvement Act of 1970.* 1 J. Maritime Law & Comm. 537, 563 (1970).

Thus, at such time as the Convention becomes effective with respect to the United States, the liability rules for some vessels would be established as a uniform policy and state liability rules could not apply to those vessels. States could recover their cleanup costs and damages to natural resources under the Convention, but even then apart from the Act's limited scope there would be no codified liability principles for shippers, terminal facilities, vessels not covered by the Convention, or others causing oil spills.

III. General Maritime Law Has a Limited Application to Oil Spill Control and Liability, Leaving Many Aspects to Action by the States.

General maritime law does not provide a broad remedy for oil spill damage. But this lack of a broad remedy is not reflected in the district court's statement that the Act "leaves undisturbed the remedies available under maritime

law for private injury caused by oil spillage or other pollution." 355 F.Supp. at 1247.[1] The court supported its statement by citation to several decisions in the Federal courts which "considered oil pollution as a maritime tort for which damages may be awarded," (*Ibid.*), but most of those cases were libels against a vessel: *Salaky* v. *The Atlas Barge No. 3,* 208 F.2d 174 (C.A. 2 1953); *California* v. *The Bournemouth,* 307 F.Supp. 922 (C.D. Cal. 1969); *Petition of New Jersey Barging Corp.,* (re *The barge Perth Amboy No. 1*),168 F.Supp. 925 (S.D.N.Y. 1958). It is of course settled law that proceedings *in rem* against a vessel lie within admiralty's exclusive jurisdiction, *Madruga* v. *Superior Court,* 346 U.S. 556, 560, and owners of shoreline property damaged by an oil spill are entitled to libel the offending barge or tanker in admiralty, notwithstanding that the damage or injury may have been consummated on land, 46 U.S.C. § 740. The maritime tort liability of a vessel found to be unseaworthy or negligently operated is not limited to injuries actually caused by the physical agency of the vessel, but may include injuries caused by the cargo after the cargo leaves the ship. *Gutierrez* v. *Waterman S.S. Corp.,* 373 U.S. 206, 209.

None of the foregoing authorities cast any light on the existence of a supposed general theory of property damage liability for oil pollution in coastal waters. They indicate rather a partial policy for cases resulting from the spilling of oil by vessels, but are silent as to leakage or spillage of oil by terminal facilities, pipelines, motor vehicles, or any other means of containment.

One case cited by the court below was not a libel against a vessel: *Fireman's Fund Ins. Co.* v. *Standard Oil Co.,* 339 F.2d 148 (C.A. 9 1964). In that case the opinion indicates

[1] The Act states explicitly, in §1161(o) (1), that it leaves undisturbed property damage liability that may arise "under any provision of law."

that several yachts and their insurers filed an admiralty action *in personam* against the City of Los Angeles and others as owners or operators of what appears to have been a terminal facility for handling oil. The opinion indicates no challenge to the court's jurisdiction and no need to discuss alternative remedies which may have been available in the California State courts. It has been suggested that "where a traditional maritime interest is adversely affected and the injury is suffered on admiralty waters, admiralty jurisdiction exists regardless of whether the spill originated on land or water." McCoy, *Oil Spill and Pollution Control,* 40 Geo. Wash. L. Rev. 97, 102 (1971).

Thus the extent of substantive maritime law on liability for property damage caused by oil spills appears to be that vessels can be libeled only in an admiralty court and that owners of vessels can limit their liability *in personam* under the Limitation of Liability Act. No tenet of substantive maritime doctrine has been adduced which would bar a state from applying the rule of *Rylands* v. *Fletcher,* L.R. 3 H.L. 330, to a terminal facility operator or from applying the concept of enterprise liability to shippers who wish to import oil through the state's ports.

The district court disposed of the principle that "if the maritime law affords no remedy, the states may provide one" by citing this Court's recent opinion in *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375. In the district court's interpretation, the *Moragne* decision "rejected the notion that the absence of a federal statute or a maritime rule on the subject compelled the conclusion that state law must govern." 355 F.Supp., at 1249. This extraordinary interpretation was derived from quite different facts and holdings. The subject in *Moragne* was recovery for wrongful death, on the basis of unseaworthiness, within territorial waters. There was a maritime rule on the subject: *The Harrisburg,* 119 U.S. 199, held there could be no recovery.

There was a Federal statute, the 1920 Death on the High Seas Act, which preserved state wrongful death remedies in territorial waters. "Congress," this Court said, "merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law," adding the observation that in 1920 state law "imposed a standard of behavior generally the same as—and in some respects more favorable than—that imposed by federal maritime law." 398 U.S., at 399. This Court in *Moragne* did not question the validity of Congress' delegation to the states in 1920: rather, it noted that the 1920 legislation was necessitated by the ruling in *The Harrisburg*, and then decided to overrule *The Harrisburg*.

In the light of the *Moragne* decision, we submit that Section 1161(o)(1) of the Act can be read as indicating the disposition of Congress to let state remedies for property damage from oil spills help to effectuate the substantive duty to prevent oil pollution in the marine environment. As to vessels carrying oil, state law imposes a standard of behavior generally the same as Federal law, although state law may be in some respects more favorable to the interests of environmental quality. As to terminal operators and shippers, the absence of an admiralty remedy coupled with the "savings-to-suitors" clause of Art. III may not compel the conclusion that state law must govern, but these considerations certainly permit the conclusion that state law may apply.

IV. The Application of State Liability Rules to Oil Spills, Subject to Admiralty Principles Limiting Vessel Liability, Will Not Infringe on the Essential Uniformity Required for Maritime Commerce.

Oil spill liability can attach to several different classes (terminal operators, vessels and their owners, oil shippers,

other parties who cause spills), in several different places (inland non-navigable waters, navigable rivers, territorial coastal waters, the high seas), and for several different kinds of damage (clean-up costs by various levels of government, clean-up by private parties, damage to public resources, and damage to private property). State rules on liability should be analyzed for the "who, where, and what" points of application before they are invalidated *in toto*. See *Missouri Rates Cases*, 230 U.S. 474.

It is unnecessary to discuss place and type of damage at length. The same law which a state clearly could enforce on its inland non-navigable waters but could not enforce on the high seas, it may or may not be able to enforce on navigable and coastal waters. The differences between clean-up costs and property damages are plain, and the district court distinguished these two elements of damage. But the decision below did not discuss the different classes subject to liability under the Florida statute; it concentrated on vessel liability and thus overstated the impact of Florida law on uniformity of admiralty law. We submit that potential defendants should be analyzed class by class.

(a) *Vessels and their owners*

Massachusetts does not challenge the Limitation of Liability Act (46 U.S.C. §§ 181-189) and concedes that a shipowner sued *in personam* for oil pollution damages could limit his liability under that Act. Beyond this, the Florida and Massachusetts statutes do not undermine or conflict with any principle known to require uniform nationwide application. The Water Quality Improvement Act allows four defenses to an action against a vessel for cleanup expenses, and the states do not explicitly allow the same defenses on the same terms. However, the principal purpose of the Act is to prevent oil spills, not to prevent the imposi-

tion of liability on vessels. This essential purpose is reinforced by both the Florida and Massachusetts statutes.

(b) *Terminal Facilities*

Business enterprises such as oil terminals which are located on the waterfront deal with maritime commerce on one side and shoreside commerce on the other. The operators must therefore deal with state and local governments with respect to many matters ranging from taxation and land use regulation to industrial safety standards. Just as states may strive to attract certain types of industries through tax concessions, special zoning provisions, and so forth, states have a concomitant power to discourage the location of some industries on terms incompatible with the state's interests. Such conditions do not interfere with a uniform admiralty law, since admiralty law does not purport to control the relationship between businessmen who happen to do business on the waterfront and their state and local governments and littoral neighbors. Certainly, no limit on liability similar to that given vessels exists for shorefront facilities at admiralty. Only in the Act's eight million dollar limitation on liability to the Federal government does any concept of limitation for terminal facilities' liability exist, and the Act's scheme is manifestly not an exclusive Federal one.

(c) *Shippers and owners of oil*

Although Florida law does not mention shippers, Massachusetts extends liability to "persons who owned or controlled the oil" spilled on waters of the Commonwealth. M.G.L. c. 21, §27(10). The owners of such oil will in many if not most cases be importing it to Massachusetts to sell within the Commonwealth. As they are held strictly accountable for oil spill costs, they can spread the cost of insuring against

such enterprise liability among the consumers. The market price of oil will consequently come closer to reflecting all costs, including social costs, of bringing oil to these consumers. See Morris, *Hazardous Enterprises and Risk-Bearing Capacity*, 61 Yale L.J. 1172 (1952).

Admiralty rules govern the liability of cargo to the vessel in various situations such as general average, and the rights of salvors in cargo are another subject of admiralty. See Gilmore and Black, THE LAW OF ADMIRALTY, chs. V, VIII (1957). But no rule bars enterprise liability for cargo. The economic effects of such liability would be felt locally on land rather than generally throughout the maritime community, and adoption of such laws thus becomes a political question for each coastal state. Massachusetts has decided that more pervasive security against oil spills is worth a slight increase in the price its citizens must pay for oil.

Conclusion

For the reasons stated herein, the Commonwealth of Massachusetts urges that the judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX

Massachusetts General Laws, Ch. 21

§ 27. Duties and Responsibilities of Division; Oil Pollution of Waters.

It shall be the duty and responsibility of the division to enhance the quality and value of water resources and to establish a program for the prevention, control, and abatement of water pollution. Said division shall:

* * *

(10) Undertake immediately, whenever there is spillage, seepage or other discharge of oil into any of the waters of the commonwealth or into any off-shore waters which may result in damage to the waters, shores or natural resources utilized or enjoyed by citizens of the commonwealth to cause said spillage, seepage or discharge to be contained and removed by whatever method it considers best. Chemicals shall not be used in the clean-up operation of oil spills unless their use has been authorized by the division, and if a public water supply or shelfish beds may be affected, by the department of public health.

In this clause, the word "oil" shall mean insoluble or partially soluble oils of any kind or origin or in any form including, but not limited to, crude or fuel oils, lube oil or sludge, asphalt, insoluble or partially insoluble derivatives of mineral, animal or vegetable oils.

The division shall determine the person responsible for causing such spillage, seepage or discharge and the names of all persons who owned or controlled the oil or who owned or controlled or leased the vessel, tank, pipe, hose or other container in which the oil was located when the spillage, seepage or discharge occurred. Said persons shall be jointly and severally liable to the commonwealth for all costs and expenses incurred by the division in making such investigation, and in containing and removing the oil, and shall be

jointly and severally liable to the commonwealth for all damages done to natural and recreational resources, including all costs of restoring damaged areas to their original condition, and to any other person for any damages to his real and personal property. The person responsible for causing such spillage, seepage or discharge shall be punished by a fine of not more than ten thousand dollars for each day such spillage, seepage or discharge continues, or by imprisonment for not more than two years or both.

Upon request of the director, the attorney general shall bring an action to recover all costs and expenses incurred for such investigation, containment, removal and restoration.

Such costs and expenses shall be recovered in an action of tort, and shall be credited to the account from which said sums of money had been advanced and may, subject to appropriation, be expended by the division for the purposes set forth in this clause. In any such action the commonwealth may also seek recovery for all loss and damage to the natural and recreational resources of the commonwealth.

Any owner or operator of a vessel, vehicle, railroad car or facility used for the production, processing, transportation, transfer or storage of oil shall, as soon as he has knowledge of any such spillage, seepage or discharge of oil into or adjacent to waters of the commonwealth, promptly notify the director of the division or his representative of such discharge. Any person who fails so to notify the director or his representative of such discharge shall be puninshed by a fine of not more than five thousand dollars.

Any person who removes oil, as defined in this clause, from the waters of the commonwealth or adjoining shorelines shall be entitled to reimbursement from any other person for the reasonable costs expended for such removal, if such oil resulted from the negligence of such other person. When such discharge results from the joint negligence

of two or more persons, each shall be liable to the others for his pro rata share of the costs of removal.

Any person who gratuitously renders assistance at the request of a duly authorized officer in removing oil from the waters of the commonwealth or adjoining shorelines shall not be held liable, notwithstanding any other provision of law, for civil damages as a result of any act or omission by him in removing such oil, except acts or omissions amounting to gross negligence or willful or wanton misconduct.

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§ 50. **Oil Pollution of Waters; Division May License Certain Terminals, Issue Regulations, Inspect Equipment, and Require Payment of Fees; Penalty for Operation of Terminal without License.**

The division shall have the power to license all terminals in the commonwealth for the loading or discharge of petroleum products from vessels, and may issue reasonable rules and regulations in connection therewith for the purposes of protecting the public safety and for preventing the spilling of the liquids into the water of the commonwealth.

The division shall inspect periodically hoses, gaskets, tanks, pipelines and other equipment to make certain that they are in good operating condition, and may order the renewal of any of such equipment found unfit for further use.

The division may require by rules and regulations that suitable equipment be readily available to remove from the waters of the commonwealth any petroleum or chemical liquids spilled or discharged therein.

The division may require the payment of reasonable fees, designed to cover the costs incurred by the above inspections and its other duties.

Whoever operates such a terminal without a license from the division shall be punished by a fine of one hundred dollars per day during such period of unauthorized operation.

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§ 50A. Oil Pollution of Waters; Terminal Operators to Provide Boom to Encircle Ships Discharging Oil, etc.; Authority of Director; Penalties.

Notwithstanding the provisions of section fifty, every owner or operator of an oil terminal or wharf shall employ a trained crew and have a plastic or wooden boom which is capable of encircling any ship or vessel depositing oil into tanks or other receptacles at such terminal or wharf, and which is designed to prevent seepage, overflow or excess oil from polluting or contaminating any lake, river, harbor, tidal water or flats. If the director finds that because of the negligence of such owner, operator or one of his agents or servants repeated seepage, overflow or excess oil has contaminated any lake, river, harbor, tidal waters or flats he shall require every such owner or operator to encircle every ship or vessel depositing oil at his wharf or terminal with such a boom. The authority granted to the director under the preceding sentence shall not be construed to diminish his powers to regulate and control oil spillage, including his power to require the use of booms, granted by section fifty. The owner or operator of any such wharf or terminal shall remove any oil held within such boom prior to a ship or vessel leaving the same. Whoever violates the provisions of this section shall be punished by a fine of not more than one thousand dollars. A license issued under section fifty to operate a terminal may be revoked for violation of any of the provisions of this section.

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§ 50B. Bond to Be Furnished by Vessels Receiving or Discharging Petroleum Products; Forfeiture to Extent of Damage, Costs, Fines; Penalties for Operation Without Bond.

Any vessel, whether or not self-propelled, in or entering upon the waters of the Commonwealth for the purpose of discharging or receiving a cargo of any bulk petroleum product in the commonwealth shall post a bond with the

division of at least twenty-five thousand dollars payable to the commonwealth. Said bond shall be in a form approved by the division and may be obtained individually or jointly by the vessel, its owners or agent, its charterer, or by the owner or operator of the terminal at which the vessel discharges or receives said petroleum products. If the division determines that oil, as defined in clause (10) of section twenty-seven, has been discharged into the waters of the commonwealth from said vessel, the bond shall be forfeited to the extent of the costs incurred by the division in containing and removing said oil, to the extent of damage caused to the natural and recreational resources of the commonwealth, and to the extent of any otherwise uncollectable fines levied against the operators of said vessel for violation of any laws relating to water pollution abatement. The remedies provided in this section shall be in addition to all other remedies available. No bond shall be released without certification by the division that the vessel has not been a source of oil pollution. Other evidence of financial responsibility which is satisfactory to the division may be accepted by the division in lieu of bonding. Any vessel in the waters of the commonwealth for the purpose of discharging, or which receives, cargo of bulk petroleum products in the commonwealth without being bonded as provided in this section, or without having submitted other evidence of financial responsibility acceptable to the division, and the owner, agent and charterer of said vessel, and the operator of any terminal which receives or discharges such cargo from or to a vessel not so bonded, shall be punished by a fine of not more than five thousand dollars.

The superior court in equity shall have jurisdiction to enforce the provisions of this section.

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§ 51. Same Subject; Division to Represent Commonwealth in Its Relations with Federal Government and with Cities,

Towns and Authorities, and May Enter into Certain A ments and Contracts.

The division shall represent the commonwealth in its lations with the federal government and with cities, t and authorities in all matters relating to oil pollut the waters of the commonwealth or off-shore waters. It enter into agreements with said agencies to coordinate pervisory activities and, subject to appropriation, to reasonable costs.

It may contract with public or private individuals, cerns or agencies for such protective and clean-up ser as it may require.

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§ 52. Same Subject; Collection and Disposal of Waste O Permit.

No one shall engage in the business of collecting w oil or shall dispose of waste oil in any waters of the c monwealth, without a permit from the division. Said p mit shall not be granted unless the division is satisfied t such disposition will not result in further pollution.

The division shall consult with and advise persons en gaged or intending to engage in the business of disposi of waste oil as to the most appropriate and best method disposal. It shall conduct a program of study and resear and demonstration, relating to new and improved meth of waste disposal.
